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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. HOLLY MELINDA WINSTON, Defendant and Appellant.	A155919 (Solano County Superior Court No. FCR 336925)

Holly Melinda Winston pleaded no contest to one count of grand theft (Pen. Code,[1] § 487, subd. (a)), one count of identity theft (§ 530.5, subd. (a)), and one misdemeanor for receiving stolen property (§ 496, subd. (a)) in exchange for dismissal of other charges and was placed on probation for three years. The plea form Winston signed included a provision stating that she waived her right to appeal the judgment and rulings of the court. Later, at sentencing, the trial court imposed an electronic search condition as one of her probation terms, including "any electronic devices [Winston] own[s], possess[es]," or to which she has "access," and to provide passwords upon demand.

[1] All undesignated statutory references are to the Penal Code, unless otherwise specified.

Winston now seeks review of her sentence pursuant to a certificate of probable cause to appeal (§ 1237.5), raising as the sole issue a contention that the electronic search condition is overbroad.

Neither side prevails entirely here. We reject the Attorney General's contention that Winston's appellate waiver compels dismissal of the appeal. But we also reject Winston's argument that the probation condition must be stricken outright under *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*) as applied in *In re Ricardo P.* (2019) 7 Cal.5th 1113 (*Ricardo P.*) or that we should devise a narrowing of its language here on appeal. Just as we did recently in *In re Alonzo M.* (2019) 40 Cal.App.5th 156 (*Alonzo M.*), we will vacate the condition imposed on Winston, as worded, and remand so that it may be better tailored to the legitimate supervisory objectives supporting its adoption.

I. BACKGROUND

A. *Incidents Leading to Charges Against Winston*

1. Case No. FCR 335067

On January 13, 2018, police officers stopped Winston for jaywalking and she agreed to a search of her person and property. During the search, the officers found several bank checks that did not belong to her, valued at $1,300 in total, including a check purportedly made out by victim R.K. Several weeks before, R.K. had reported her car stolen and her checkbook was in the car.

Winston's explanation for why she was carrying checks belonging to other people was that she received them from a friend named Cody Cannon, and she had attempted to cash them at a bank in Sacramento. She claimed that she did not know where Cannon got the checks and was on her way to return the checks to him when she was stopped by the police.

2. Case No. FCR 336925

On January 25, 2018, Winston was arrested after being caught fleeing the rear fire exit of a Kohl's department store with a stolen suitcase and a stolen backpack, both filled with stolen merchandise. The total value of the stolen items came to $1,463.07. When the arresting officers approached her, Winston "loudly protest[ed]" her arrest, claiming that she had not stolen anything. While being escorted to a squad car, she "imitat[ed] a seizure," folding to her knees, sliding down to the ground and kicking her legs out repeatedly.

Meanwhile, Winston continued to claim that she did not steal anything. When the officers took her to the hospital for medical clearance, she started screaming and "violently kick[ing] the wall of the patrol car and bang[ing] her head against the screen and window bars." She feigned another seizure when the officers tried to restrain her.

Police officers found several checks and credit cards, a driver's license, a gift card, an identification card and a social security card that belonged to various victims in her pockets and the stolen backpack from Kohl's. After contacting the persons named on the stolen items, the police verified that none of the victims knew Winston or had given her permission to possess their personal identifying information.

Winston later admitted to stealing merchandise from Kohl's and noted that "she has always believed it is okay to steal from stores, but not okay to steal from individuals."

3. Case No. FCR 335435

On January 30, 2018, the owner of a Vacaville eatery, Pelayo's Restaurant, reported that Winston and her husband committed a "dine-and-dash," leaving the establishment without paying their $47.47 bill. After eating, Winston's husband left first. Winston approached the cash register

and presented an American Automobile Association (AAA) roadside assistance card and a social security card that belonged to two different people, neither of whom was Winston or her husband. When told that the restaurant did not accept either as a mode of payment, Winston explained that her credit card was "in the parking lot," and then attempted to flee. One of the waitresses followed her into the parking lot and tried to stop her from leaving. She threatened to "kick [the waitress's] ass."

When police officers arrived, Winston claimed she thought she had a credit card with her and only realized she did not when she went to pay. She offered the AAA and social security cards as collateral while she went to find her credit card from her nearby belongings. After taking Winston and her husband into custody, the police officers discovered they were carrying various items with personal identifying information belonging to multiple victims, including a credit card, a Macy's asset protection identification card, and four checkbooks and some loose checks.

Winston's husband told the police that he and Winston had been "hanging out" with Cannon, who allegedly had committed mail theft using stolen mailbox keys, in a hotel room. After Winston and Cannon had a fall-out, she "grabbed a bunch of his stolen items" and left. Winston initially denied any knowledge of the checkbooks, but later reported the property belonged to Cannon and admitted that she knew the checkbooks were "probably stolen." Winston later told her probation officer that she took the stolen checkbooks to "protect potential victims" and she "wasn't trying to steal anyone's identity."

B. *Plea and Sentencing*

1. Plea

On September 11, 2018, Winston accepted an open plea to the charges stemming from all three of the above incidents, subject to a maximum prison

sentence of four years and eight months. In exchange for her no-contest plea, parties agreed that she would be placed on probation. Winston signed a waiver of rights, including a provision stating that "[e]ven though I will be convicted in this case as a result of my plea, I have the right to appeal the judgment and rulings of the court (e.g.: Penal Code Section 1538.5(m)). I give up my right of appeal." She also initialed a statement that she was of sound mind, not under the influence of any substances that would impair her judgment and she understood the nature of such proceedings. On the same day, the trial court reviewed the form in detail with her and obtained her acknowledgement for each of the provisions she initialed.

2. Sentencing Record

a. *Criminal History*

Winston was first arrested by the United States Army in 2014 for larceny after shoplifting on a military base. The case was later dismissed. In 2015, Winston was arrested for "felony second degree theft of property in Baldwin County, Alabama," and placed on formal probation for a period of two years. During her probation, Winston failed to report to her probation officer and to appear for court, which led to the revocation of her probation and the issuance of a bench warrant for her arrest. Ultimately, Winston absconded to California while the bench warrant remained outstanding.

In 2017, a second bench warrant for Winston's arrest was issued after she failed to appear in court regarding a pending misdemeanor theft of property charge.

b. *Probation Report and Recommendation*

Prior to sentencing, the probation department submitted a report advising the court as follows:

In an interview with the probation officer who prepared her probation report, Winston stated that she recently relocated to California with her husband and five children, and they were all residing with her mother-in-law. Others provided conflicting information. Winston's husband reported that he and his wife were staying in a hotel with a friend and none of their children was with them. Although Winston reported her intention to move into her mother-in-law's residence in Sacramento upon release, her mother-in-law vehemently denied such possibility and noted that "under no circumstances would she allow [Winston] to reside within her residence" because she has stolen from her in the past. Her mother-in-law also indicated that "she wants 'no part' of Winston's release from custody." Given the uncertain status of Winston's housing situation, her poor performance in the past during probation and her out-of-state ties, her probation officer considered her a flight risk.

During her interview with the probation officer, Winston also revealed that she struggles with mental health issues and substance abuse, including marijuana, methamphetamine, and Adderall. She said that she suffered from postpartum depression in 2015 and regular suicidal thoughts, which led to two or three attempts in the past to hang herself. She admitted that usage of methamphetamine has " 'killed who she was,' " and expressed a desire to address her substance abuse on formal probation. The probation officers questioned the sincerity of Winston's communicated desire to comply with the terms of her probation, if granted, and advised against a grant of community supervision. To address the concerns raised by Winston's poor probation compliance record, the probation report recommended subjecting her to

periods of "flash incarceration" without entitlement to conduct credit for any violation of terms should probation be granted.

Ultimately, the probation department was unwilling to recommend probation. Its report stated: "[D]efendant [Winston] scored high on the pretrial risk assessment. She has a multi-state criminal record which includes a felony conviction for theft of property. She was confirmed to be on formal probation in the state of Alabama and in warrant status due to her failure to appear at a probation violation hearing related to her failure to obey all laws. She reports being homeless and unemployed. Additionally, she acknowledged current substance abuse issues and a history of mental illness." Given Winston's "history of non-compliance," and her "out of state ties," and the risk of flight, the report concluded that Winston "does not appear appropriate for a grant of community supervision" and, as a result, "it is respectfully recommended probation be denied and a sentence be imposed."

3. Sentencing

At the combined sentencing hearing on November 20, 2018, the trial court granted Winston probation for a period of three years and ordered her to pay restitution and administrative fees. Among other probation terms and conditions, the trial court imposed an electronic search condition upon the prosecution's request and over defense counsel's objection, allowing "search and seizure of any electronic devices [Winston] own[s], possess[es], or ha[s] access to, and provide passwords." In support of its request for the electronic search condition, the prosecution reasoned that since Winston pleaded guilty to identity theft, there was a concern of her "get[ting] access to people's accounts online." In response to Winston's objection, the prosecution offered

to tailor the condition by limiting its scope to financial records, but Winston's counsel rejected the offer.[2]

This appeal followed.

II. DISCUSSION

Relying primarily on *Ricardo P.*, *supra*, 7 Cal.5th 1113, and our opinion in *Alonzo M.*, *supra*, 40 Cal.App.5th 156, Winston attacks the search condition imposed on her as unconstitutionally overbroad and asks that we either order it stricken or, here on appeal, devise an appropriate narrowing of its terms. The Attorney General responds, first, that the appeal should be dismissed because Winston's waiver of appellate rights bars any challenge to her terms of probation and, second, in the event we reach the merits, the electronic search condition is not overbroad.[3] In the alternative, the Attorney General suggests that we remand for modification of the condition.

A. *Enforceability of the Appellate Waiver*

Winston argues that waiver of the right to seek review of the electronic search condition was not among the specified terms of her plea. It could not have been, she argues, because the probation condition had yet to be imposed

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[2] [Prosecution]: "We can tailor [the electronic search condition] to search and seizure of devices for financial information and records." [¶] [Trial counsel]: ". . . I [do not] believe that [there is] a way to actually tailor it."

[3] The Attorney General makes two other arguments. First, as a threshold matter, he suggests that the appeal should be dismissed for failure to obtain a certificate of probable cause, and that if there is any unconstitutional overbreadth in the challenged condition, it was invited error. The certificate of probable cause, filed in the superior court on August 21, 2019, as an attachment to Winston's notice of appeal, for unexplained reasons was not originally part of the record as filed in this court, but was belatedly filed with us on January 8, 2020. Second, the Attorney General also argues invited error. We resolve this appeal without any need to address either of these two lines of argument.

when she entered her plea. Pointing out the plea form does not indicate anything about an open-ended prospective waiver, Winston contends she could not have knowingly and intelligently waived future errors. According to her, a later-imposed search condition does not fall within the scope of the waiver she understood she was signing, and to the extent her plea agreement may be read to include a waiver of future arising bases for appeal, it is unenforceable. By way of response, the Attorney General, relying heavily on *People v. Panizzon* (1996) 13 Cal.4th 68 (*Panizzon*), draws a distinction between "a general waiver of the right to appeal[] given as part of a negotiated plea agreement" and an appeal of sentencing error based on "sentencing issues that were left *unresolved* by the particular plea agreements involved." (*Id.* at p. 85.) This case, he argues, involves a general waiver given as part of a plea agreement.

On this record, we agree with Winston. *Panizzon* is distinguishable. In that case, the defendant pleaded no contest to various felony charges pursuant to a plea bargain that specifically provided for a sentence of life with the possibility of parole, plus 12 years. (*Panizzon*, *supra*, 13 Cal.4th at p. 73.) As part of the plea agreement, the defendant signed a waiver of constitutional rights that included the following provision: "I hereby waive and give up my right to appeal from the *sentence* I will receive in this case. I also waive and give up my right to appeal the denial of any and all motions made and denied in my case." (*Id.* at p. 82, italics added.) The trial court accepted the plea and sentenced him in accordance with the plea. (*Id.* at p. 73.) The defendant then appealed his sentence, contending that it was disproportionate to the sentences his codefendants received and thereby constituted unconstitutionally cruel and unusual punishment. (*Ibid.*)

On review in the California Supreme Court, the court compared and distinguished the waiver at issue in *Panizzon* with those in *People v. Sherrick* (1993) 19 Cal.App.4th 657 (*Sherrick*) and *People v. Vargas* (1993) 13 Cal.App.4th 1653 (*Vargas*). (*Panizzon*, *supra*, 13 Cal.4th at p. 86.) The key distinction—and the factor the *Panizzon* holding hinges upon—is that the plea term the defendant appealed was an "integral element of the negotiated plea agreement," while the challenged sentencing terms at issue in *Sherrick* and *Vargas* were matters left open for resolution at sentencing.[4] Both *Sherrick* and *Vargas* involved a waiver of appellate rights that used broad and general language, without reference to any specific terms or conditions. (See also *People v. Mumm* (2002) 98 Cal.App.4th 812, 815 [holding that the defendant's appeal waiver did not include the determination of his out-of-state offense because at the time he made the waiver, the court had not yet determined treatment of his prior conviction].)

This case is more like *Sherrick* and *Vargas* than *Pannizon*. The language of the plea form Winston signed was a general waiver where she agreed to waive her right to appeal any ruling. It was "nonspecific" (*Panizzon*, *supra*, 13 Cal.4th at p. 85, fn. 11), meaning that it failed to specify what rulings the parties had in mind, and most importantly, whether it encompassed only existing rulings that had been made to date, or existing rulings as well as rulings that might be made in the future. The provision simply stated: "I have the right to appeal the judgment and rulings of the court . . . . I give up my right of appeal." There was no evidence from the

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[4] In *Sherrick*, the appeal waiver stated that, " 'I now waive and give up my right to appeal in this case. I understand that based on this agreement, I will not be permitted to appeal any ruling in this case.' " (*Sherrick*, *supra*, 19 Cal.App.4th at p. 659.) In *Vargas*, the plea form simply said, " 'I waive my appeal rights.' " (*Vargas*, *supra*, 13 Cal.App.4th at p. 1662.)

verbal exchange between the parties that they discussed this issue. Nor is it possible to glean anything from the probation report. The issue was first brought up at sentencing, when the prosecutor requested the personal search and seizure condition near the end of the proceeding, almost as an afterthought. Before that point in time, nothing in the record suggests that Winston was aware that the condition was, or might be, part of her plea bargain.

Courts have traditionally interpreted plea bargains through the paradigm of contract law. (*People v. Knox* (2004) 123 Cal.App.4th 1453, 1458, quoting *People v. Nguyen* (1993) 13 Cal.App.4th 114, 120.) "Analogizing to contract law, courts examining plea bargains 'should look first to the specific language of the agreement to ascertain the expressed intent of the parties. [Citations.] Beyond that, the courts should seek to carry out the parties' reasonable expectations. [Citations.]' " (*Ibid.*) Under contract principles, a provision must be interpreted to give effect to the mutual intention of the parties *as it existed at the time of contracting* (Civ. Code, § 1636, italics added.) On this record, we see no objective evidence of any mutual intention to waive future error.

We therefore conclude that this case is controlled by the rule in *Sherrick* and *Vargas*. (*People v. Castellanos* (June 26, 2020, No. H045792) ___Cal.App.5th___ [2020 Cal.App.LEXIS 581, *7]; see *Sherrick*, *supra*, 19 Cal.App.4th at p. 659 ["Such a waiver of possible future error does not appear to be within defendant's contemplation and knowledge at the time the waiver was made"]; *Vargas*, *supra*, 13 Cal.App.4th at p. 1662 [" '[T]he valid waiver of a right presupposes an actual and demonstrable knowledge of the very right being waived. [Citations.]' . . . The burden is on the party claiming the existence of the waiver to prove it by evidence that does not leave the

matter to speculation, and doubtful cases will be resolved against a waiver."].)

B. *Electronic Search Condition*

Winston asks us to strike the electronic search condition because it is unconstitutionally overbroad and should be considered invalid under *Ricardo P.*, *supra*, 7 Cal.5th 1113, as *Ricardo P.* interprets and applies the holding in *Lent*, *supra*, 15 Cal.3d 481. She contends that the condition is unreasonably overbroad because none of her underlying offenses involves illicit or improper use of electronic devices.

Winston advances this overbreadth argument both as a statutory matter under *Lent*, and as a constitutional matter under *In re Sheena K.* (2007) 40 Cal.4th 875, 890. (See *Ricardo P., supra,* 7 Cal.5th at pp. 1137–1141 (conc. & dis. opn. of Cantil-Sakauye, C. J.).) The imposition of such a broad condition, she urges us to conclude, is not supported by a legitimate state interest, or tailored to meet such an interest without abridging her right to privacy as guaranteed by both the California Constitution and the United States Constitution. Alternatively, Winston argues, we should order a narrowing of the electronic search condition to cure the overbreadth.

Naturally, the Attorney General takes a different view, identifying effective supervision and deterrence of future crimes as the relevant compelling state interest since her repeated offenses of identity theft prompted concerns that she may " 'get[] access to people's accounts online,' " especially considering her history of dishonesty with law enforcement about her actions and motives. He asks us to conclude there is no overbreadth in imposed condition, either as a statutory matter under *Lent* or as a constitutional matter under *In re Sheena K.* If there is any overbreadth, he argues the error was invited because Winston expressed no interest in the

narrowing limitation offered to her at sentencing. Finally, he argues in the alternative that we should remand to the trial court to cure any overbreadth.

Based on Winston's criminal history of identity theft and record of dishonesty, there is a legitimate state interest in imposing an electronic search condition since, in today's financial world, identity theft committed offline often goes hand in hand with identify theft committed online. Thus, we think there is a sufficient relationship to future criminality to pass muster under *Lent*, despite the burdensomeness of the condition. But we do find the particular condition imposed to be too broad to survive scrutiny under the proportionality test enunciated in *Ricardo P.* And we conclude it must be tailored to limit authorization of warrantless searches so there is a better fit between the means of electronic search and the legitimate supervisory end of deterring future crime relating to online identity and property theft.

1. Applicable Principles

In general, sentencing courts have "broad discretion in fashioning terms of supervised release, in order to foster the reformation and rehabilitation of the offender, while protecting public safety." (*People v. Martinez* (2014), 226 Cal.App.4th 759, 764.) But that discretion is cabined within statutory limitations. (§ 1203 et seq.) *Lent*, *supra*, 15 Cal.3d 481, "supplies a framework for determining whether a condition of probation is 'reasonable' and therefore authorized by the Legislature's general endorsement of such conditions." (*Ricardo P.*, *supra*, 7 Cal.5th at p. 1132 (conc. & dis. opn. of Cantil-Sakauye, C. J.).) To test conditions of supervised release for reasonableness, courts apply the test announced in *Lent*. On appeal, our review for *Lent* error is for abuse of discretion. (*People v. Olguin* (2008) 45 Cal.4th 375, 379.)

Under *Lent*, a court abuses its discretion when it imposes a term or condition that " '(1) has no relationship to the crime of which the offender was

convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality.' " (*Lent*, *supra*, 15 Cal.3d at p. 486.) "This test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a . . . term." (*People v. Olguin*, *supra*, 45 Cal.4th 375); accord, *Ricardo P.*, *supra*, 7 Cal.5th at p. 1118.)

The Attorney General does not dispute that the electronic search condition fails the first two *Lent* prongs—the condition has no relationship to Winston's crime and the use of electronic devices is not itself criminal. (See *In re Erica R.* (2015) 240 Cal.App.4th 907, 913; *In re J.B.* (2015) 242 Cal.App.4th 749, 754–755.) The issue, therefore, is whether the electronic search condition imposed in this case is reasonably related to preventing future criminality.

Here, we are guided by our Supreme Court's recent decision in *Ricardo P.*, which explained that *Lent*'s future criminality prong "contemplates a degree of proportionality between the burden imposed by a probation condition and the legitimate interests served by the condition." (*Ricardo P.*, *supra*, 7 Cal.5th at p. 1122.) "A probation condition that imposes substantially greater burdens on the probationer than the circumstances warrant is not a 'reasonable' one." (*Id.* at p. 1128.) In the case of electronic search conditions, the salient burden on a probationer is the burden imposed on his or her privacy interest. (*Id.* at pp. 1122–1123.)

A probationer's interest in privacy is impacted by such a condition because, as the United States Supreme Court has observed, cell phones contain "a digital record of nearly every aspect of their [owners'] lives—from the mundane to the intimate," and "[t]he sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates,

locations, and descriptions." (*Riley v. California* (2014) 573 U.S. 373, 394–395; accord, *Ricardo P.*, *supra*, 7 Cal.5th at p. 1123.)

Although the future criminality prong of *Lent* does not "require 'a nexus between the probation condition and the defendant's underlying offense or prior offenses' " (*Ricardo P.*, *supra*, 7 Cal.5th at p. 1122), "there must be information in the record establishing a connection between the search condition and the probationer's criminal conduct or personal history—an actual connection apparent in the evidence, not one that is just abstract or hypothetical." (*Alonzo M.*, *supra*, 40 Cal.App.5th 156.) A condition may be supported by, for example, "information in a probation report that raises concerns about future criminality unrelated to a prior offense." (*Ricardo P.*, *supra*, at p. 1122.)

This division applied *Ricardo P.* in *Alonzo M.*, *supra*, 40 Cal.App.5th 156. In that case, a juvenile offender was found to have committed a series of felony auto burglaries with a group of other juveniles. (*Id.* at pp. 158–159.) The juvenile court imposed an electronic search condition requiring him to "submit [his] cell phone or any other electronic device under [his] control to a search of any medium of communication reasonably likely to reveal whether [he was] complying with the terms of [his] probation with or without a search warrant at any time of day or night." (*Id.* at p. 163.) The juvenile there lived in a stable home; his parents vouched for his willingness and ability to comply with discipline, and explained his behavior as out of character and part of a trend toward drug usage with friends who led him astray. (*Id.* at pp. 161–162.)

Noting that *Ricardo P.* did not categorically prohibit electronic search conditions for juvenile offenders and permitted their imposition where adequately supported by a record showing some reasonable relationship to

the risk of future offense (*Alonzo M.*, *supra*, 40 Cal.App.5th at pp. 165–166), we upheld the imposition of an electronic condition but found the open-ended nature of the particular condition imposed to be overbroad, so we vacated the challenged condition, and remanded for consideration of better "tailor[ing] to allow[] search of any medium of communication reasonably likely to reveal whether Alonzo is associating with prohibited persons." (*Id.* at p. 168.)

Our guidance on remand in *Alonzo M.* on the subject of tailoring was general. We left it to the juvenile court, in its discretion, to develop language that would appropriately weigh "[t]he burden on [the ward's] privacy" so that it was "substantially proportionate to the probation department's legitimate interest in preventing him from communicating with his coresponsibles or other identified peers who might draw him in to criminal conduct (*Alonzo M.*, *supra*, 40 Cal.App.5th at p. 168; see also *In re Amber K.* (2020) 45 Cal.App.5th 559 [vacating and remanding for narrowing under *Ricardo P.*]; *In re David C.* (2020) 47 Cal.App.5th 657 [same].)

Unlike *Ricardo P.* and *Alonzo M.*, this is an adult probation case, but that makes no practical difference to the outcome here. While juvenile courts have broader latitude in imposing probation conditions than do criminal courts sentencing adult offenders (*Ricardo P., supra,* 7 Cal.5th at p. 1131 (conc. & dis. opn. of Cantil-Sakauye, C. J.)), "[w]ith juvenile probationers, as with adult probationers, the Legislature has generally directed that conditions attached to probation must be 'reasonable.' " (*Ibid.*; Pen. Code, § 1203.1, subd. (j); Welf. & Inst. Code, § 730, subd. (b).) We therefore apply the same three-pronged test under *Lent* in both juvenile and adult cases,[5]

[5] *Lent* itself was an adult probation case. See also *People v. Bryant* (2019) 42 Cal.App.5th 839, 843–846 (applying *Ricardo P.* proportionality test in appeal of electronic search condition in adult probation case); *People v.*

while bearing in mind that somewhat closer scrutiny is required when evaluating probation conditions applicable to adults. (*Ricardo P.*, *supra*, at p. 1118 [" 'A condition of probation which is impermissible for an adult criminal defendant is not necessarily unreasonable for a juvenile receiving guidance and supervision from the juvenile court.' "].)

2. Analysis

We resolve this appeal in the same way we resolved the appeal in *Alonzo M.*: We will uphold the use of an electronic search condition as supported by the record, but we will conclude there must be a closer fit between the particular search condition imposed and the supervisory objectives it seeks to achieve.

The record shows that, since 2014, Winston has been arrested numerous times for theft-related offenses. Some of these arrests took place in Alabama and led to convictions there for felony second degree property theft. Winston's current offenses involved multiple stolen items with personal identifying information from numerous victims, in addition to stolen merchandise from Kohl's valued over $1,400.

This pattern of criminal activity is persistent and relatively recent. In her interview with the probation department, Winston showed no remorse and took no responsibility for her behavior, expressing the belief that "it is okay to steal from stores, but not okay to steal from individuals." Adding to this scofflaw attitude toward theft, Winston's record of probation compliance in Alabama was poor. She repeatedly failed to report to her probation officer and ultimately left the state without authorization, ending up in California. Although in this case, Winston expressed a willingness to comply with the

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Cota (2020) 45 Cal.App.5th 786, 789–791 (same); *People v. Castellanos*, *supra*, ___Cal.App.5th___ [2020 Cal.App.LEXIS 581, *14–*17] (same).

terms and conditions of her probation, the probation report doubted the sincerity of that expressed desire and recommended denial of probation altogether.

Thus, the probationer before us has a demonstrated record of poor compliance with probation conditions, is a flight risk, and has said she feels free to commit further property theft offenses. She also suffers from a constellation of personal problems (drug usage, homelessness, mental illness) and these problems serve to heighten the challenges to effective oversight of her behavior. As a general matter, therefore, we have no problem reaching the conclusion that the imposition of an electronic search condition serves a legitimate interest and was properly imposed.

Granted, there is no evidence that Winston used a computer or any other electronic device to carry out her crimes. But *Ricardo P.* does not require such a nexus. Studies have shown that digital and mobile banking has become a pervasive trend in the United States.[6] With the advances of mobile wallets and digital financing, emerging types of financial crime have also developed rampantly over recent years.[7] Considering that Winston's

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[6] Eighty percent of Americans reportedly prefer digital banking over visiting a physical branch. (Huffman, *Online Banking Has Become More Widespread Among Consumers, Survey Finds* (October 2019) <https://www.consumeraffairs.com/news/online-banking-has-become-more-widespread-among-consumers-survey-finds-103119.html> [as of July 23, 2020].)

[7] Eighty-nine percent of a Business Insider study respondents said they use mobile banking while over half of credit unions surveyed saw an annual increase in mobile wallet adoption and transactions. (Phaneuf, *State of Mobile Banking in 2020: Top Apps, Features, Statistics and Market Trends* (August 2019) < https://www.businessinsider.com/mobile-banking-market-trends> [as of July 23, 2020].) Cost of new account fraud, identity theft cases related to the unauthorized creation of new accounts to take out loans,

pattern of criminal conduct has consistently involved property and identity theft, the prosecution's stated need to ensure close digital monitoring of her conduct is legitimate and warrants a substantial degree of intrusion into her life.

But this is where the proportionality test enunciated in *Ricardo P.* comes into play. As in *Alonzo M.*, we conclude that the particular electronic search condition imposed in this case, as worded, is too broad to meet *Ricardo P.*'s requirement that it be carefully calibrated to the state's legitimate interest in probation supervision. The condition before us requires Winston to submit "any electronic devices [she] own[s], possess[es], or ha[s] access to, and provide passwords" without any confinement at all. The stated purpose is to monitor whether Winston would "get[] access to people's accounts online," which is a perfectly legitimate objective, but as Winston's counsel pointed out in objecting to its imposition, access to electronic devices encompasses a wide range of information about an individual that is highly private and irrelevant to this purpose.

Content available on a probationer's electronic device or social media Web site may include intimate messages and photos, posts from other Web sites which may disclose the probationer's or the third party's political and religious affiliations, memberships in clubs or organizations, and other sensitive personal information. Even if the collection of the large amounts of data by dragnet, once it is sifted, may advance legitimate state interests to

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reached $3.4 billion in 2019. (Groenfeldt, *Credit Card Fraud Is Down, But Account Fraud That Directly Hurts Consumers Remains High* (March 2019) <https://www.forbes.com/sites/tomgroenfeldt/2019/03/18/credit-card-fraud-is-down-but-account-fraud-which-directly-hurts-consumers-remains-high/#1cef5e2020bf> [as of July 23, 2020].)

some degree, the useful data may be so intermingled with other entirely unrelated private information that it is not technologically possible to segregate the protected information from that legitimately open to view by government authorities. That is the dilemma posed by electronic search conditions. To address it, *Ricardo P.* teaches that the privacy concerns at stake must be carefully balanced against the countervailing state interest in effective probation supervision.

We shall not undertake to suggest specific language or to direct the adoption of particular limitations, but we do observe that limiting the condition to access to financial records, as the prosecution offered to do at Winston's sentencing, would be an improvement.[8] The guidance we provide here is general, as it was in *Alonzo M.* The trial court, in its discretion, should undertake to weigh "[t]he burden on [Winston's] privacy" so that any modified search condition is "substantially proportionate to the probation department's legitimate interest in preventing" (*Alonzo M.*, *supra*, 40 Cal.App.5th at p. 168) her from carrying out theft of money or property or identity theft.

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[8] Because Winston's trial counsel rejected the prosecution's invitation to impose such a condition, the Attorney General argues that she has forfeited her ability to challenge the condition in this appeal on the basis of invited error. We do not agree. The law with respect to overbreadth challenges to electronic search conditions was at the time, and to some extent remains, in an unsettled state. Because it is not apparent from the record that Winston took this position in pursuit of a tactical agenda, as opposed to having made an incorrect judgment that a tightening of the language of the condition along the lines the prosecution suggested was futile, the doctrine of invited error does not apply. (*People v. Wickersham* (1982) 32 Cal.3d 307, 332 ["the doctrine of invited error is not invoked unless counsel articulated a tactical basis for the choice"].)

Having resolved this appeal under the *Lent* test in accordance with *Ricardo P.*, we do not address Winston's related argument that the electronic search condition, as imposed, is unconstitutionally overbroad.

III. DISPOSITION

The sentence is affirmed except for the provision imposing an electronic search condition of probation, which is vacated, and the case is remanded so the court may consider the imposition of an electronic search condition consistent with this opinion.

STREETER, Acting P. J.

WE CONCUR:

TUCHER, J.
BROWN, J.